

# *Percolating Intellectual Property Law through Circuit Stewardship: Empirical and Jurisprudential Analysis of En Banc Review*

**Peter Menell and Ryan Vacca**

Perhaps more than any other field of law, intellectual property has been buffeted by the relentless and unpredictable force of technological change. Advances in digital technology and biotechnology over the past three decades have transformed society and reshaped the contours of patent, copyright, and trademark law to a greater extent than perhaps during any other comparable period in U.S. History. Although Congress has sought to adapt these regimes, its deliberative processes, political divisions, and broad responsibilities as well as uncertainty about the ramifications of reform proposals have caused statutory law to lag technological advance.

As a result, courts have come to play an outsize role in evolving intellectual property law. In some areas, legislative history and statutory purposes have provided useful interpretive guidance for addressing technological advances. Moreover, the mixed character of intellectual property regimes – incorporating common law tort doctrines and federal common law (e.g., infringement standards, fair use) to flesh out and augment statutory provisions – afford jurists leeway to evolve patent, copyright, and trademark law.

Yet judicial responsiveness to technological advance tends to be episodic, unsystematic, and path-dependent. The Supreme Court can only review a limited number of IP cases, although the recent spike suggests the growing importance of intangible assets in the economy and increasing controversy. En banc review at the circuit court level provides an alternative mechanism for resolving salient issues and intra-circuit splits. Yet, while the Federal Circuit has been particularly active in reviewing patent cases en banc, there has been relatively little comparable activity in the regional circuits where much of the copyright and trademark law develops.

This project provides historical, empirical, and comparative evidence about the use of en banc review for resolving intellectual property disputes and examines its actual and potential role in adapting intellectual property law to technological change. We contend that due to regional expertise, the need to clarify and harmonize intra-circuit law, and the virtues of ventilating issues and promoting broad input on complex interpretive questions, circuit courts should play a stewardship role in evolving intellectual property law through greater use of en banc review. Such enhanced percolation by regional circuit courts can refresh, clarify, and improve copyright and trademark law in response to changing technological, social, economic, and cultural conditions. It can also illuminate questions requiring Supreme Court or legislative attention. Among the issues on which such attention would be warranted are the role of the jury in resolving copyright infringement and fair use questions, the contours of the fair use doctrine, application of the likelihood of confusion framework to Internet issues (and the role of initial interest confusion), and the contours of the trademark nominative use doctrine.